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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRANDEN M. LABARGE,	:	**NO. 1:16-CV-1046**
Plaintiff	:	
	:	
v.	:	**(Judge Jones)**
	:	
C. MAIORANA, Warden, et al.,	:	
Defendants	:	**Filed Electronically**

DEFENDANTS' STATEMENT OF MATERIAL FACTS

Defendants the United States of America, Warden Charles Maiorana, Lieutenant Michael Collis, Lieutenant Terry Galella, Correctional Officer Justin Getz, Correctional Officer James Grizzanti, Correctional Officer John Schwartz, Correctional Officer Joshua Case, and Correctional Officer Christopher Heenan, by and through their counsel and pursuant to M.D. Pa. L.R. 56.1, hereby submit the following statement of material undisputed facts in support of their motion for summary judgment. Plaintiff is advised that pursuant to Local Rule 56.1, all facts set forth in this statement will be deemed admitted unless controverted by plaintiff with references to the record supporting plaintiff's position.

A. Labarge's housing assignments

1. Plaintiff Labarge is a federal inmate currently designated to USP McCreary located in Pine Knot, Kentucky. Declaration of Michael FiggsGanter (Ex. 1) ¶ 15.

2. Labarge was designated to USP Canaan in November 2012. FiggsGanter Decl. (Ex. 1); Inmate History Quarters (Attach. D) at 1.

3. Labarge was transferred to the special housing unit (SHU) at USP Canaan on March 20, 2015. Id.

4. Labarge remained in the SHU in either administrative detention or disciplinary segregation until April 27, 2015. Id.

5. On April 27, 2015, Labarge departed USP Canaan. Id.

B. March 21, 2015 incident

6. On March 21, 2015, at approximately 3:55 p.m., while being escorted by Senior Officer J. Getz to his cell assignment on the C-upper range in the SHU, Labarge stopped and refused to walk to

his assigned cell. FiggsGanter Decl. (Ex. 1), Memorandum of Senior Officer J. Getz (Attach. F); Memorandum of Lieutenant T. Galella (Attach. G) at 10; Incident Report #2696005 (Attach. J) at 1; Video CAA 15-0125 Labarge IOUF Range_mount.mp4 (Attach. K) (Doc. 25, submitted under seal); Video CAA 15-0125 Labarge IOUF Range Video_mount.mp4 (Attach. K) (Doc. 25, submitted under seal).[1]

7. Officer Getz gave Labarge direct orders to proceed to his assigned cell. Id.

8. Labarge turned his head and told Officer Getz that he was "gonna fuck [Getz] up if [Getz] tr[ied] to put him in the cell!" Id.

9. Officer Getz gave Labarge a direct order to not turn his head and to stop resisting escort. Id.

10. Labarge turned in an aggressive manner and attempted to break free from escort. Id.

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[1] Defendants could not serve Labarge with a copy of the sealed videos because, pursuant to BOP policy, inmates are not allowed to possess videos. However, a copy will be forwarded to Labarge, through his unit team, at the Lee United States Penitentiary in Jonesville, VA, where he is now designated.

11. Officer Getz placed Labarge on the ground with the least amount of force necessary to gain proper control of Labarge. Id.

12. Labarge was immediately removed from the range. Id.

13. At approximately 4:47 p.m., Lieutenant Galella conducted a debriefing video concerning the immediate use of force on Labarge. Ex. 1, Video CAA 15-0125 Labarge IOUF Debrief_mount.mp4 (Attach. K) (Doc. 25, submitted under seal).

14. During the debriefing video for the March 21, 2015, immediate use of force, the following information was provided by Lieutenant Galella:

> We are currently in the Special Housing Unit at the United States Penitentiary in Canaan, Pennsylvania where inmate Labarge, Branden #09683-029 was the subject of immediate use of force. A brief synopsis of inmate Labarge's actions which resulted in this immediate use of force is as follows:
>
> At approximately 3:55 p.m. on March 21, 2015 while being escorted back to his assigned cell, inmate Labarge stopped during the escort and stated that he would not proceed down the range to his assigned cell. The escorting officer gave inmate Labarge a direct order to proceed down the range. It was at this time that inmate Labarge stated he was going to fuck up the escorting officer and attempted to break free of his grasp. Staff placed inmate Labarge on the ground to gain further control of him, placed him in leg restraints, and escorted him to a holding cell where he was

photographed. We will now conduct a medical assessment on inmate Labarge.

Id. at 00:21.

15. The debriefing video next depicts staff proceeding to the cell holding Labarge, searching Labarge, taking him to the medical department, and having medical staff assess Labarge for any injuries. Id. at 01:07-06:41.

16. The following information was provided by Officer Betz during the debriefing video:

On March 21st at 3:55 p.m. while working out of SHU 3, I was escorting inmate Labarge to his cell assignment on C upper range. While escorting inmate Labarge, he stopped before the grill of C upper range and said he would not proceed. I gave inmate Labarge a direct order to proceed to the cell assignment and he turned his head and said he was going to fuck me up if I tried to put him in that cell. I gave him a direct order to not turn his head and not to resist the escort. Inmate Labarge turned in a very brisk manner and attempted to break free from escort. At this time, we placed inmate Labarge on the ground to gain proper control of the inmate.

Id. at 08:00.

17. The following information was provided by the health services representative, a registered nurse, who conducted the medical assessment:

I did the assessment of inmate Labarge. Vital signs are stable. He denied any shortness of breath. He had a small cut on his chin.

First aid was rendered. He had other bruising with old facial bruising from a previous incident. There were no other injuries. He did complain of a headache. Denied any dizziness or blurred vision or nausea or vomiting. The restraints did not restrict any breathing or circulation.

Id. at 08:40.

18. A review of Labarge's medical record provides that Labarge described moderate pain in his head and was found to have a "small l/2 cm shallow cut" on the center of his chin following the immediate use of force. Declaration of Patricia Burgerhoff (Ex. 2) ¶ 5; Attach. A at 2-3.

19. It was also noted that Labarge had an "old trauma to left orbital area, mild swelling, bruising purple" which was several days old and unrelated to the events of March 21, 2015. Id. ¶ 5; Attach. A. at 2-3.

20. During the March 21, 2015, examination, Labarge denied any blurred vision, nausea, vomiting, and/or shortness of breath. Id. ¶ 6; Attach. A, at 3.

21. Labarge was able to speak in full sentences without any issues. Id.

22. Other than a small and shallow cut noted on his chin, Labarge was found to be alert and oriented to his surroundings. Id.

23. The small cut on Labarge's chin was cleaned and a sterile dressing was applied. Id. ¶ 7; Attach. A, at 3.

24. The nurse who conducted the medical assessment does not recall Labarge sustaining any additional injuries in the March 21, 2015, incident which were not included in her medical note. Id. ¶ 7.

25. The nurse who conducted the medical assessment does not recall Labarge asserting and/or treating him for any injury to his hands or fingers. Id. ¶ 8.

26. On March 21, 2015, an after action review report was created which determined that the actions of the staff involved in the March 21, 2015 incident with Labarge were reasonable and appropriate. FiggsGanter Decl. (Ex. 1), After Action Review Report (Attach. G).

27. Labarge received no additional follow up care nor did he submit any sick call requests while he remained at USP Canaan after the March 21, 2015, encounter. Burgerhoff Decl. (Ex. 2) ¶ 9.

28. Labarge was transferred from USP Canaan to USP McCreary approximately four weeks after the incident, on April 27, 2015. Id.

29. During a health screening at USP McCreary on May 20, 2015, Labarge made no complaints of a broken finger or any symptomatic conditions. Id. ¶ 10; Attach. B.

30. On October 14, 2015, Labarge complained about an injury to his right finger during an examination. Id. ¶ 11; Attach. C.

31. Labarge provided a history of the March 21, 2015, incident during the examination on October 14, 2015, but was found to be asymptomatic. Id.

32. X-rays did not show any fractures. Id. at Attach. C at 2.

33. The examining doctor noted that, "[t]here may be early arthritis setting in the area." Id.

C. Labarge's disciplinary proceedings

34. Following the March 21, 2015, incident, Labarge was issued incident report number 2696005 by Officer Getz for threatening another with bodily harm and refusing to work or accept a program assignment. FiggsGanter Decl. (Ex. 1); Attach. J (Incident Report) at 1.

35. The description of the incident reads:

On March 21, 2015 at approximately 3:55 PM, I was escorting inmate Labarge, Branden reg # 09683-029 to his cell assignment on the C-Upper range in the Special Housing Unit. Upon reaching the grill for the C-Upper range, inmate Labarge stopped and refused to walk to his assigned cell. I gave inmate Labarge a direct order to proceed to the cell. Inmate Labarge turned his head and explained "gonna fuck me up if I try to put him in the cell!" I then gave inmate Labarge a direct order to not turn his head and not to resist the escort. He then turned in an aggressive manner and attempted to break free from escort. I placed inmate Labarge on the ground with the least amount of force necessary to gain proper control of inmate Labarge. He was then escorted to medical for assessment.

FiggsGanter Decl. (Ex. 1), Attach. J, at 1.

36. On April 2, 2015, a Discipline Hearing Officer (DHO) found Labarge guilty of threatening another with bodily harm and refusing to obey an order. Id. at Attach. J (Chronological Disciplinary Record) at 1 (Report Number 2696005).

37. As discipline, Labarge lost 27 days of good conduct time for the charge of threatening another with bodily harm and 3 days of good conduct time for refusing to obey an order. Id.

38. The DHO sanctions remain valid and were not overturned or expunged. Id.

D. BOP policy on immediate use of force

39. BOP Program Statement 5566.06 governs staff's use of force and the application of restraints on inmates. Figgsganter Decl. (Ex. 1), Program Statement 5566.06 (Attach. H).

40. Pursuant to BOP Program Statement 5566.06, "[t]he Bureau of Prisons authorizes staff to use force only as a last alternative after all other reasonable efforts to resolve a situation have failed. When authorized, staff must use only that amount of force necessary to gain control of the inmate, to protect and ensure the safety of inmates, staff and others, to prevent serious property damage, and to ensure institution security and good order." Id. at 2 (quoting 28 C.F.R. § 552.20).

41. Pursuant to BOP Program Statement 5566.06, "staff may immediately use force and/or apply restraints when the behavior described in [28 C.F.R.] § 552.20 constitutes an immediate, serious threat to the inmate, staff, others, property, or to institution security and good order." Id. at 4.

42. "In an immediate use of force situation, staff may respond with or without the presence or direction of a supervisor." Id. at 5.

43. "[S]taff must use common sense and good correctional judgment in each incident to determine whether the situation allows for the implementation of calculated or immediate use of force procedures." Id.

44. "Immediate or unplanned use of force by staff is required when an inmate is trying to self-inflict injuries which may be life-threatening or is assaulting any other person to include other inmates." Id.

45. "Staff shall use only that amount of force necessary to gain control of the inmate." Id. at 7.

46. "Situations when an appropriate amount of force may be warranted include, but are not limited to: (1) Defense or protection of self or others; (2) Enforcement of institutional regulations; and (3) The prevention of a crime or apprehension of one who has committed a crime." Id.

47. "In immediate use of force situations, staff shall seek the assistance of mental health or qualified health personnel upon gaining physical control of the inmate." Id. at 17.

48. "Following any incident involving the use of force (calculated or immediate) and the application of restraints, the Warden, Associate Warden (responsible for Correctional Services), Health Services Administrator, and Captain must meet and review the incident . . . to assess the rationale of the actions taken (e.g., if the force was appropriate and in proportion to the inmate's actions)." Id. at 21.

E. Recreation in the SHU

49. Every inmate confined in the SHU at USP Canaan is given an opportunity for recreation as proscribed by BOP policy. Declaration of Captain Richard Hollingsworth (Ex. 3) ¶ 3.

50. BOP Program Statement (P.S.) 5270.10, Special Housing Units, provides that inmates in the SHU "will receive the opportunity to exercise outside your individual quarters at least five hours per week, ordinarily on different days in one-hour periods. You can be denied these exercise periods for a week at a time by order of the Warden if it is determined that your use of exercise privileges threatens safety, security, and orderly operation of a correctional facility, or public safety." Ex. 3, P.S. 5270.10 (Attach. A) at 8-9.

51. According to Program Statement 5270.10, "[i]f weather and resources permit, the inmate shall receive outdoor exercise periods." Id. at 8.

52. "Restriction or denial of exercise is not used as punishment. The Warden or Acting Warden may not delegate the authority to restrict or deny exercise. Exercise periods are only restricted or denied when the inmates activities pose a threat to the safety, security and orderly operation of a correctional facility, or health conditions of the unit." Id. at 9.

53. "The appropriate staff member recommends recreation restrictions to a supervisor who then makes the recommendation to the Warden in writing. The recommending staff member describes briefly the reason for recommending a restriction and its proposed extent. The Warden reviews the recommendation and approves, modifies, or denies the restriction. If the Warden approves a restriction, it must be based on the conclusion that the inmate's actions pose a threat." Id.

54. Inmates routinely decline recreational periods because they choose not to participate or because they are not ready to be escorted to

recreation once informed of their opportunity to participate. Id. 3 ¶ 5.

55. Staff members in the SHU at USP Canaan are prohibited from preventing inmates, who are present and prepared at the appropriate time, from participating in recreation. Id. ¶ 6.

56. All inmates housed in the SHU at USP Canaan are provided with adequate measures to maintain their health and wellbeing as proscribed by federal law. Id. ¶ 7.

57. Inmates housed in the SHU as a result of disciplinary segregation are restricted from possessing certain items to ensure the safety and security of the institution. Id. ¶ 8.

58. For security reasons, inmates housed as a result of disciplinary segregation have their personal property impounded with the exception to a limited amount of reading, writing and religious materials. Id.

59. While in the SHU, these inmates retain access to legal and personal mail, institutional programming, health services, and the administrative remedies program. Id.

E. Labarge's failure to exhaust administrative remedies

i. Labarge's Bivens' claims

60. The Bureau of Prisons (BOP) has established a three-tiered system whereby a federal prisoner may seek formal review of any aspect of his imprisonment. 28 C.F.R. § 542.10, *et seq.*

61. First, "an inmate shall ... present an issue of concern informally to staff, and staff shall attempt to informally resolve the issue before an inmate submits a Request for Administrative Remedy." Id. § 542.13(a).

62. Second, if an inmate is unable to informally resolve his complaint, he may file "a formal written Administrative Remedy Request, on the appropriate form (BP-9), [within] 20 calendar days following the date on which the basis for the Request occurred." Id. § 542.14.

63. The Warden has 20 days to respond to the inmate's written Administrative Remedy Request. Id. § 542.18.

64. "An inmate who is not satisfied with the Warden's response may submit an Appeal on the appropriate form (BP-10) to the appropriate Regional Director within 20 calendar days of the date the Warden signed the [BP-9] response." Id. § 542.15(a).

65. "An inmate who is not satisfied with the Regional Director's response may submit an Appeal on the appropriate form (BP-11) to the General Counsel within 30 calendar days of the date the Regional Director signed the response." Id.

66. An exception is made for appeals of DHO decisions, which are first raised directly to the Regional Office and then to the Central Office level. Id. § 542.14(d)(4).

67. If an inmate "does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level." Id. § 542.18.

68. If a remedy is rejected, it is returned to the inmate and the inmate is provided with a written notice "explaining the reason for rejection." Id. § 542.17(a), (b).

69. On July 28, 2016, a search of BOP records was conducted to determine whether or not Labarge had exhausted available administrative remedies regarding the issues of excessive force, inadequate conditions of confinement, deliberate indifference to his safety, retaliation, violations of his free speech and due process rights, assault and battery, negligence, and intentional infliction of

emotional distress raised in his complaint. Specifically, the allegations that:

a. on March 20, 2015, Labarge was taken to the Special Housing Unit (SHU) and, for no reason, placed in a cell with a concrete bed with a thin mattress, thin sheet/blanket, and no shower (doc. 1 (Compl.) ¶¶ 20-35, 108, 110, 114);

b. on March 21, 2015, when Labarge questioned why he was being placed in a cell with a cellmate who staff knew would be a threat to him, he was slammed to the ground and assaulted by staff for refusing, causing the middle finger of his right hand to be fractured or severely hurt and to suffer pain in his knee and back as a result of the excessive force (id. ¶¶ 39-81, 105-114, 120-124, 133-141);

c. he was denied recreation six times between March 20, 2015, and April 12, 2015, while in the SHU (id. ¶¶ 82-92, 100-104, 112-119, 129-132);

d. he was recommended for a transfer as the result of an incident report but before he was seen by the DHO on the charge (id. ¶¶ 97-98);

e. he was denied writing utensils (id. ¶¶ 100, 103-104, 125-128);

f. policies were overlooked in order to get him out the SHU quickly because he is a known jailhouse lawyer (id. ¶¶ 91-99).

70. The BOP's computer print-out of Labarge's administrative remedy filings provides details concerning each remedy filed, including the administrative remedy number, the date the remedy was received, an abstract of the issue(s) raised, the event facility, the date it was

responded to, and the current status of the remedy, using codes to indicate the reason why a particular remedy has been rejected. Figgsganter Decl. (Ex. 1), Administrative Remedy Generalized Retrieval (Attach. B) at 1-14; Rejection Status Reason Codes (Attach. B) at 15-17.

71. BOP records show that as of July 28, 2016, Labarge had filed a total of twenty-six administrative remedies during his incarceration. Id.

72. Labarge exhausted his claim of excessive use of force concerning the March 21, 2015, incident via administrative remedy number 817458. Id. ¶ 19; Attach. B at 6 (Remedy ID 817458-F1), 10 (Remedy ID 817458-R1), 12 (Remedy ID 817458-A1).

73. A review of administrative remedy number 819373 reveals:

   a. On April 23, 2015, Labarge filed administrative remedy number 819373-F1 at the institution level concerning a "complaint about staff." Ex. 1, Attach. B, at 7.

   b. Administrative remedy 819373-F1 was closed on May 18, 2015, with an "explanation." Id.

   c. On June 19, 2015, Labarge filed administrative remedy number 819373-R1 with the Regional Office concerning the "complaint about staff." Id. at 9.

   d. Administrative remedy number 819373-R1 was rejected by the Regional Office on June 23, 2015, because it was not considered a "sensitive" issue. Id. at 9 (rejection code "SEN"), 17 (Rejection Status Reason Codes).

e. On July 15, 2015, Labarge filed administrative remedy number 819373-A1 with the Central Office concerning the "complaint about staff." Id. at 11.

f. Administrative remedy 819373-A1 was rejected by the Central Office on July, 30, 2015, and Labarge was informed that he "must first file at the institution." Id.

74. A review of administrative remedy number 825855 reveals:

a. On June 16, 2015, Labarge filed administrative remedy number 825855-F1 at the institution level concerning "complaints with cellie in SHU; staff complaints." Id. at 8.

b. Administrative remedy 825855-F1 was rejected on June 24, 2015, for being untimely. Id. at 8 (rejection code "UTF"), 17.

c. On July 13, 2015, Labarge filed administrative remedy number 825855-R1 with the Regional Office concerning "complaints with cellie in SHU; staff complaints." Id. at 11.

d. Administrative remedy number 825855-R1 was rejected on July 30, 2015, with a remark stating, "need to supply a response from the warden before your appeal can be accepted for review." Id.

e. On July 29, 2015, Labarge filed administrative remedy number 825855-A1 at the institution level concerning "complaints with cellie in SHU; staff complaints." Id. at 13.

f. Administrative remedy number 825855-A1 was rejected on August 18, 2015, with a remark stating, "need to supply a response from the warden before your appeal can be accepted for review." Id.

75. A review of administrative remedy number 825865 reveals:

a. On June 16, 2015, Labarge filed administrative remedy number 825865-F1 at the institution level concerning "complaints with no rec while in SHU at USP Canaan." Id. at 8.

b. Administrative remedy 825865-F1 was rejected on June 24, 2015, for being untimely. Id. at 8 (rejection code "UTF"), 17.

c. On July 13, 2015, Labarge filed administrative remedy number 825865-R1 with the Regional Office concerning "complaints with no rec while in SHU at USP Canaan." Id. at 10.

d. Administrative remedy number 825865-R1 was rejected on July 15, 2015, with a remark stating, "need to supply a response from the warden before your appeal can be accepted for review." Id.

e. On July 29, 2015, Labarge filed administrative remedy number 825865-A1 with the Central Office concerning "complaints with no rec while in SHU at USP Canaan." Id. at 12.

f. Administrative remedy number 825865-A1 was rejected on August 7, 2015, because it was filed at the wrong level. Id. at 12 (rejection code "WRL"), 17.

76. Labarge's remaining administrative remedies were either filed prior to the earliest date at issue in the complaint (Ex. 1, Attach. B, at 1-5) or concerned a complaint about mailroom staff (id. at 5) or DHO appeals (id. at 6, 7, 9, 13).

ii. Labarge's FTCA claims

77. A search of the BOP database system referred to as Content Manager reveals that Labarge has filed only one administrative tort claim (TRT-NERO-2015-04861) and it concerns an allegation of insufficient recreation while housed in the SHU at USP Canaan, on March 21, 2015. Figgsganter Decl. (Ex. 1) ¶¶ 5, 16-17; Claim for Damage, Injury or Death (Attach. C), at 4-5.

78. Administrative tort claim number TRT-NERO-2015-04861 was denied by the Northeast Regional Office on December 23, 2015. Id., Attach. C, at 1.

79. The database search indicated that Labarge failed to administratively exhaust any other issues referenced in his complaint and filed under the Federal Tort Claims Act. Id.

Respectfully submitted,

PETER J. SMITH
United States Attorney

s/ Melissa Swauger
MELISSA SWAUGER
Assistant U.S. Attorney
PA 82382
MICHELE E. LINCALIS
Supv. Paralegal Specialist
316 Federal Building
240 West Third Street
Williamsport, PA 17701
Phone: (717) 221-4482
Facsimile: (717) 221-2216

Dated: November 21, 2016

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRANDEN M. LABARGE,	:	**NO. 1:16-CV-1046**
Plaintiff	:	
	:	
v.	:	**(Judge Jones)**
	:	
C. MAIORANA, Warden, et al.,	:	
Defendants	:	**Filed Electronically**

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion as to be competent to serve papers.

That on November 21, 2016, she served a copy of the attached

DEFENDANTS' STATEMENT OF MATERIAL FACTS

by placing said copy in a postpaid envelope addressed to the person hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Williamsport, Pennsylvania.

Addressee:

Branden M. Labarge
Reg. No. 09683-029
USP Lee
P.O. Box 305
Jonesville, VA 24263

s/ Michele E. Lincalis
Michele E. Lincalis
Supv. Paralegal Specialist